Williams Contracting, Inc. *and* Kippy Phillips *and* David Phillips. Cases 25–CA–21415–1 and 25–CA–21415–2

November 9, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 20, 1992, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] We reject the Respondent's contention that the judge's findings reflect bias because he discredited the testimony of all the Respondent's witnesses. It is well established that the total rejection of one view, including significant credibility resolutions, ''does not alone impugn the trier of fact.'' *Kendick Engineering*, 244 NLRB 989 fn. 2 (1979). The Respondent has essentially excepted to certain credibility findings made by the judge. It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that, on two occasions, David Phillips lied about his actual rate of pay to state or Federal agents at the request of the Williamses. In fact, Phillips testified that he was specifically requested by the Williamses to lie about his wages only at the Cannelton project. It is unclear whether Phillips was specifically requested to lie to the Government agent at the jobsite involved in this case but, clearly, he was not encouraged to be truthful either.

[2] Although the judge found that it was unnecessary to resort to *Wright Line*, 251 NLRB 1083 (1980), we find that his analysis was consistent with that decision. The General Counsel met its initial burden of establishing that David and Kippy Phillips' protected conduct—mutually complaining about not receiving their proper wages and threatening to report the Respondent to the authorities if such payment was not made—was a motivating factor in the Respondent's decision to permanently lay them off. The burden then shifted to the Respondent to show that the same action would have taken place notwithstanding the protected conduct. The judge found, and we agree, that the Respondent failed to meet its burden because each of the reasons proffered were pretextual. Thus, the Board is entitled to infer that the Respondent's true motive was unlawful—i.e., because of the Phillipses' protected activity. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Finally, we find that our decision is consistent with the Second Circuit's recent refinement of its opinion in *Holo-Krome Co. v. NLRB*, 947 F.2d 588 (1991). On the Board's petition for rehearing in *Holo-Krome*, the court held, inter alia, that ''[w]hen the Board reviews an ALJ's decision, and when a court of appeals reviews a Board's decision, the reviewing bodies should be able to examine the entire record to determine if improper motivation has been shown . . . .'' 954 F.2d 108, 114 (2d Cir. 1992).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Williams Contracting, Inc., Orleans, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Walter Steele, Esq., for the General Counsel.
Rayford T. Blankenship, Esq. and *John Rybolt, Esq. (Blankenship & Associates)*, of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. It was charged on July 22, 1991, in Case 25–CA–21415–1 by Kippy Phillips, an individual, and in Case 25–CA–21415–2 by David Phillips, an individual, that Williams Contracting, Inc. (the Respondent), has engaged in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act. On September 27, 1991, the Regional Director issued a consolidated complaint wherein it is alleged that Respondent violated Section 8(a)(1) of the Act on about June 21, 1991, by discharging and/or laying off the Charging Parties, David Phillips and Kippy Phillips, because they engaged in concerted complaints to the Respondent and concerted activities with each other for the purposes of securing the prevailing wage rate at the East Washington Water Corporation jobsite in Salem, Indiana. The complaint also alleges that Respondent also violated the Act by on or about June 24, 1991, telling an employee that it engaged in the aforedescribed conduct.

Respondent filed a timely answer which denied any violative conduct. At the trial of this matter in Bedford, Indiana, on January 28, 29, and 30, 1992, all parties were afforded reasonable opportunity to adduce relevant evidence. The parties declined an opportunity to argue orally and chose to file briefs which, because of extensions of time granted, were not received at my office until April 21, 1992.

Upon the entire record, including the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material, a corporation duly organized under and existing by virtue of the laws of the State of Indiana. The Respondent has maintained its principal office and place of business in Orleans, Indiana (the facility), and is, and has been at all times material, engaged at said facility and at various Indiana jobsites in the business of underground and underwater utility construction and ditch work in the building and construction industry. During the 12 months prior to the filing of the unfair labor practice charge, a representative period, the Respondent, in the course and conduct of its business operations described above in subparagraph 2(b), provided services valued in excess of $50,000 for construction employers, each of which employers during the same representative period either (1) purchased and caused to be shipped to their respective In-

diana locations or jobsites, directly from points located outside the State of Indiana, goods and materials valued in excess of $50,000, or (2) performed services valued in excess of $50,000 in States other than their State of incorporation or location of their principal offices or jobsites.

I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a small family owned and operated underground utility construction enterprise. Among its customers are various local governmental units for which water distribution pipe systems are constructed by means of ditch trenching, below grade pipe installation, and back-filling. Respondent's chief executive officer and president is Tom Williams. His wife, Sue Williams, is the corporate secretary. Their son, Allan Williams, holds the position of vice president. Tom and Allan Williams generally supervise the field operations of its work force of from 5 to 12 employees, consisting of trenching machine operators, backhoe and bulldozer operators, laborers, and mechanics. At the times material, Respondent's operations covered rural areas of Southern Indiana.

Respondent's office is located in the basement of Tom and Sue Williams' residence where a female secretary assists with the clerical duties, including the payroll preparation of which Sue Williams testified that she was ''somewhat'' in charge. Tom and Allan Williams generally spend their time in the field supervising several jobsites. Allan Williams frequently operates machinery, as apparently does his father on some occasions.

Kippy Phillips first worked for Respondent in 1973 and for various periods of time until 1989, after which date he was either recalled after the completion of the job or after the winter shutdown or rehired upon his request on a regular basis up to the summer of 1991. He operated a backhoe and bulldozer, i.e., he filled and leveled the ditch after installation of plastic ''PVC'' pipe by laborers. Kippy's nephew, David Phillips, commenced work for Respondent in 1984 as a laborer and worked regularly thereafter except for seasonal layoffs, after which, according to uncontradicted testimony, he was regularly recalled by Respondent. David Phillips progressed from laborer to machine operator. At times material herein, he operated the trencher, which, as its name suggests, digs an open trench into which the pipe is immediately laid and connected by laborers. David Phillips was apparently deemed by Respondent to be a sufficiently responsible worker, that he had been frequently designated as the crew chief who gave routine instructions to laborers and others in the absence of either Williamses. There is no allegation nor sufficient evidence that his discretion was such as to constitute supervisory status under the Act.

Respondent has had occasions in the past to perform work under conditions whereby it was obliged to pay its employees the prevailing wage rates as determined by the appropriate government agencies in pursuance of the enforcement of the Fair Labor Standards Act or Davis-Bacon Act. On those occasions, the appropriate state and/or Federal agents conducted routine on-site interviews of employees to determine if their actual rate of pay coincided with the payrolls reported to those agencies. David Phillips testified that on two prior occasions at different jobsites, at the request of the Williamses, he misrepresented his actual lower pay rate to the agent to be that represented by the Respondent, i.e., the higher prevailing wage rate. He was not contradicted by either Tom or Allan Williams, and I therefore credit him.

B. *The Salem Jobsite*

In 1991, both Phillipses were recalled to work by Respondent—Kippy to a jobsite in Paoli in January and David in February or March at one in Bedford, Indiana. Both were reassigned in the last week of May to Salem, Indiana, where Respondent was commencing work for a new contract with the East Washington (County) Water Company. Along with the Phillipses, commencing work on that job also were laborers Wayne Patton and Brock Fischer. Kippy ran the backhoe and bulldozer and David operated the only trencher assigned to the job. Respondent owned two other trenchers and operated them at other sites prior to mid-June 1991. Also employed on the Salem job on a sporadic basis was Gary Dillard, Tom Williams' former son-in-law. Dillard worked variously as laborer, foreman, supervisor, and operator, depending on the job. During the summer of 1991, he shuttled between the Salem and Bedford jobs and divided his workweek between the two places. Patton and Fischer were relatively new, inexperienced workers. Fischer is reputed to be the son of the administrator of the East Washington Water Company.

Respondent admits that it was obligated to pay the prevailing minimum wage rate, as determined and applied under the Davis-Bacon Act, at the Salem jobsite at least as long as Federal funding lasted. Respondent's contract obliged it to lay 147,840 feet of water pipe in 120 calendar, i.e., 80 working days. Thus Respondent calculated that it must lay from 3000 to 4000 feet of pipe per day. A penalty was assessed at $100 a day for work in excess of 120 days, but Tom Williams testified without specificity that ''other options'' were open to him. David Phillips testified without contradiction that extensions are, and have been, readily granted to every job where he has worked.

It is undisputed that the general geographical area of the rural Salem jobsite lay in the midst of embedded underground rock. Clearly, the existence of rocks is an excavator's problem. When encountered, either the trencher must be modified by the on-site removal of the dirt cutting chain and its replacement with a rock cutting chain by the operator and laborers, or two trenchers must be at hand, i.e., one for rock cutting and one for dirt trenching. Tom Williams sought to minimize the problem by testifying that he knew where the rock was generally located, and that the Salem site was ''not particularly'' rocky. He corroborated David Phillips' testimony that changing chains was too time-consuming and, as such, a prohibitive procedure at Salem. He finally admitted that he really was not aware of what was being encountered in the dirt at Salem. I credit contrary, more convincing testimony that yes, indeed the very rocky nature of the Salem soil caused problems. In cross-examination, Respondent's witness Dillard admitted that during the first few weeks at Salem, only one trencher was assigned there and that David Phillips frequently encountered problems attempting to cut through or around rock with a dirt chain. By not taking time to change chains, David appears to have followed Respond-

ent's policy of not resorting to the time consuming option of changing chains. Tom Williams testified that you cannot change chains every time you encounter rock because it is too time consuming, and the appropriate procedure is to ''lay back and start laying again.'' Dillard testified that it was acceptable procedure to try and cut through the rock and that normally Respondent uses two trenchers ''to expedite'' the procedure but did not do so initially at Salem. He testified that there was a large amount of rocks at the Salem jobsite.

Another problem encountered at Salem was Respondent's lack of easement at the outset of work. Tom Williams admitted this but insisted that it did not cause a slowdown because the crew simply could hop and skip about to areas where easements had been granted. His testimony is unbelievable on its face. Williams admitted that in June he had easements for only part of the 4-inch pipe installation and that it was ''impossible'' to lay 3-inch pipe before laying the 4-inch pipe. More reasonable and believable is the unrefuted testimony of David Phillips that during the first week at Salem, the job was shut down for half a day by an easement dispute and that bypassing areas of noneasement entailed lost time consumed in nonproductive loading and unloading of equipment and driving about to noncontiguous areas. I also credit David Phillips' certain, detailed, and specific testimony that rock was encountered every 1000 feet at Salem. There was no effective, explicit, competent contradiction. Finally, Kevin Phillips testified without contradiction that he overheard Allan Williams state that the Salem job was not going well because of several problems, inclusive of machinery breakdowns and lack of easements.

C. *The Concerted Wage Complaint*

Before commencing the Salem job, David Phillips was told by Allan Williams that the job was a ''prevailing wage job.'' David later informed Kippy Phillips, Patton, and Dillard. Allan Williams testified that for the first week or two, the Phillipses were erroneously paid much less than the prevailing wage but that Brock Fischer, a laborer of vastly lesser job tenure, was paid the prevailing wage rate which grossly exceeded the Phillipses wage rate. Neither Patton nor Dillard were paid the prevailing wage rate for those early weeks. Gene Van Scoyc is employed as a labor standards officer for the Indiana Department of Commerce (IDOC). It is the function of her position to oversee compliance by local contractors with prevailing wage determinations on those federally funded jobs. Investigation and discoveries of possible noncompliance are reported to the Wage Claim Division of the U.S. Department of Labor (DOL). Salem was a federally funded job. The contract for the Salem job was administered by an entity entitled ''River Hills.'' As the contracted administrator, they are responsible to IDOC to see that the construction is in compliance with the prevailing area wage obligation. Employed by that agency was Teresa Bradding who visited the Salem job and interviewed employees regarding their wages on about June 5 or 6, 1991. Bradding reported her investigation findings to Van Scoyc who later communicated with Respondent.

The Phillipses testified without contradiction as to the events at that visitation. Allan Williams first instructed Kippy Phillips to report to the investigator and to agree with what she asked about his wages, i.e., confirm receipt of the prevailing wage rate. When Kippy suggested that what he might tell her was not in accord with his reported wage rate, Williams arranged for her to see Dave Phillips instead. With Allen present and interceding to answer before Dave Phillips could respond, the impression conveyed to Bradding was that David Phillips was receiving $16 as his base hourly wage rate, i.e., the prevailing wage. Afterward, Dave consulted with Kippy Phillips and told him what was stated to be their wage rate.

Upon receipt of their subsequent paychecks, the Phillipses, Patton, and Fischer mutually discussed their paychecks to find that only Fischer, a laborer, had received the apparent higher prevailing wage rate whereas even the experienced operators received substantially less. About a week later, Patton and the Phillipses thereafter discussed the disparity and mutually agreed to make photocopies of their checks to submit to Bradding or the IDOC office in Indianapolis. Van Scoyc testified that Kippy Williams communicated by telephone with her at the IDOC office in Indianapolis prior to his discharge in mid-June and complained that he believed the employees were not being paid the obligatory prevailing wage rate.

Tom Williams testified that in early June, he decided that pipelaying progress was too slow at Salem. Both he and Allan Williams testified to the same conclusion based upon general observation. No records or other documentation was adduced to establish objectively the amount of pipe that was purchased, delivered and installed before or after mid-June. Concededly, engineering records accessible to Respondent reflected such data, as, of course, did the date of purchase of pipe which was an ongoing event. Pipe was purchased and delivered as work progressed. When the supply of pipe stopped, work stopped. Thus there must have been a direct correlation of work progress to pipe delivery. Obviously, Respondent had access to such records but did not adduce such evidence. Instead, the Williamses relied upon their generalized, conclusionary testimony that only 1500 feet of pipe was being installed daily.

Clearly, Respondent must have encountered some kind of delay because, on about the morning of June 12, Tom Williams reproached both Dillard and David Phillips, who were both ''running crews'' for him at the time, by telling them that they needed to lay 3000 feet of pipe per day. David Phillips' testimony suggests that he perceived Williams' comments more of a rebuke than even Williams' own testimony suggests. Kippy Phillips testified that Williams ''jumped'' on David Phillips and Dillard and said that there would be more pipe laid or there would be ''new faces'' on the job. To add to that perceived insult, Allan Williams had called the crew ''a bunch of idiots'' according to Kippy's testimony. Allan Williams testified that he called the Phillipses ''dirty, ignorant, dumb [S.O.B.'s].'' He testified that he called them these names several times because of poor production and poor work performance. Allan Williams testified that from the first day, he complained to the Phillipses of their slow production and that they needed to lay 3000 feet per day. They contradict him and testify that they were never told of any specific time targets or production goals. According to Tom Williams, the first time he appeared to have urged faster pipe laying was on June 12, despite his testimony that he was aware in early June and even late May of a danger of being unable to meet the 120-day deadline. Also, Tom Williams' testimony suggests that he di-

rected his remarks to the two crew leaders, Dave Phillips and Gary Dillard.

The Phillipses, thereafter having been stung by insulting epithets and the awareness that a new, inexperienced laborer was being paid far more in wages than experienced machine operators of about 7 and 15 years service, mutually decided upon a course of action. They testified that they decided to demand payment of the prevailing wage rate as Fischer had been paid and that, if refused, they would quit their jobs and seek employment elsewhere.

Normally, the Phillipses, who live a few miles from Orleans, drive to the Orleans office and yard, park their personal vehicles and drive the equipment fuel trucks 30 or more miles to Salem. The truck has fuel to later resupply the machinery which has also itself been fueled. On the morning of June 13, David and Kippy Phillips drove their personal vehicles directly to the Salem job, leaving behind the fuel trucks. They decided that they would deliver their ultimatum to Allan Williams at the jobsite and, upon his rejection, they would quit and go home.

The Phillipses did proceed with their plan. According to their testimony, the ultimatum was given to Allan Williams to get paid the prevailing wage rate as had Fischer. According to them, Williams stated that he would not pay them the prevailing wage rate and, when they warned him that they intended to drive to Indianapolis to submit copies of their checks to the IDOC agent, Allan Williams answered ''go on in'' or ''go ahead.''

In his initial testimony, Allan Williams' description of the incident differed. He claimed that he saw the Phillipses sitting on a bank at the jobsite laughing and when asked why they did not bring the fuel truck, answered that they ''did not feel like it.'' According to Williams, he then ordered them off the job, i.e., discharged them. The Phillipses thereafter reported to the Orleans office where they encountered Tom Williams. His testimony is substantially in accord with theirs as to what they represented to him was the reason they were not at the jobsites with the fuel trucks, i.e., the wage demand refusal by Allan Williams, Williams' personal insults, and their decision to quit.

According to the Phillipses, Tom Williams, upon seeing them at the office and not at the jobsite with the fuel truck, asked what was wrong. They thereupon stated that unless they were paid the prevailing wage rate that they would quit their jobs. Tom Williams agreed to pay them the prevailing wage rate if they would return to work. David also complained about ''being talked to like a dog'' by Allan Williams. Tom Williams' testimony tended to stress the insulting language complaint as their primary complaint, but he admitted, particularly on cross-examination, that they complained about not being paid the prevailing wage rate and that they would not work unless they were paid that rate. In direct examination, he suggested that they willfully returned home instead of to their jobs. In cross-examination, he admitted their return to the job the next morning instead of that same day was with his agreement and approval.

Allan Williams' testimony undermines his own credibility as to his assertion that he ordered the Phillipses off the job, i.e., discharged them when they laughingly showed up without the fuel trucks. He admitted that after a confrontation with his father, at least over a complaint about his insults and their ''threat to quit,'' they returned because Tom Williams refused to accept their ''resignation.'' I conclude that Allan Williams contrived his version of the Phillips' confrontation. I credit their testimony, including their threat to Allan Williams to report Respondent to the IDOC as well as the wage ultimatum which he rejected.

Kevin Phillips, brother to Kippy Phillips, was also employed by the Respondent sporadically since 1981. He worked from Respondent during the spring of 1991 as a laborer until he voluntarily quit his job in the first part of June. He was assigned to the ''carefree'' jobsite on route no. 64 and worked with Walter Weiniger and Bobby Fox laying pipe. Kevin testified that at a time shortly before the layoff of David and Kippy Phillips, he was present at the Orleans shop with Weiniger and Allan Williams. He testified that he heard Weiniger ask Williams how the Salem job was proceeding and that Williams answered that it was not proceeding well because of a high degree of machine breakdowns, easement problems, and the fact that David and Kippy Phillips wanted the prevailing wage rate. Williams further stated to Weiniger that Respondent could not afford to pay the prevailing wage rate because they calculated their bid on a lower wage rate. Weiniger was called as a General Counsel's witness. Although not declared hostile, Weiniger's demeanor was that of an extremely reluctant and anxiety ridden witness. He testified that he had no recollection of the conversation. Respondent can point to the natural proclivity of blood brothers to support each other and the lack of corroboration by Weiniger. Those are factors to consider in resolving a credibility conflict between Kevin Phillips and Allan Williams, whose credibility was found lacking already, as noted above, and whose demeanor throughout the trial lacked certainty, conviction, and spontaneity. However, Allan Williams offered no effective, if any, contradiction of Kevin Phillips' testimony, which I credit.

Kevin Phillips testified, again without contradiction, to a conversation with Tom Williams, a witness whose testimony as to the terrain being ''not particularly'' rocky has been shown above to be false and contradicted by Respondent's own witnesses. According to Kevin Phillips' credible testimony, he engaged in the following conversation with Tom Williams on the carefree jobsite, on the day that David and Kippy Phillips delivered their ultimatum. Weiniger, the forgetful witness, again was present. Williams told Phillips that his kin had left the jobsite. When asked the reason, he explained that they had demanded the prevailing wage rate which would last only until the federal funding lasted, a period he estimated to be only 1 month. Williams then told Kevin that ''it was not smart'' for David and Kippy to have asked to be paid the minimum wage. Kevin Phillips effectively impeaches testimony that nonpayment of prevailing wage was an ''error.'' On June 13, the Phillipses returned to work and received backpay as well as the prevailing wage rate. Even Patton received an increase in his pay.

In June and July 1991, Respondent became the subject of investigations by IDOC, and DOL as well. It is admitted by Allan Williams that as a result of the Phillipses' complaint and the consequent investigations, Respondent was subject to adverse findings which resulted in backpay assessments on other of its jobsites. Several employees thereafter received DOL notifications of backpay due to them by Respondent.

D. *The Phillipses' Layoff*

Very quickly on or after June 13, according to credible, uncontradicted testimony, Respondent assigned two trenchers to the Salem jobsite. The job accelerated so quickly that on Friday, June 21, the supply of 4-inch pipe was reduced to only enough for 1-1/2-days work. Although no records were submitted, it appears from the vague testimony of the Williamses and others that no new 4-inch pipe was to be delivered until several weeks later. Allan Williams testified that 4-inch pipe was the only pipe scheduled to be installed at that point. Although there was a supply of 3-inch pipe available, both Williamses claimed that they could not install that type of pipe at that time. Accordingly, they say, they laid off the Phillipses and at the same time decided that since they were then two worst workers, they were considered to be permanently severed from future employment recall. Tom Williams and Allan Williams operated the machines to install the remaining pipe. Why they did not even allow the Phillipses to finish the remaining 4-inch pipe is not explained, unless it was the sudden realization on that day that the Phillipses' job performance had been so terrible, as they later testified, over the entire 7 to 15 years of employment, as to not warrant another day's work. It is indeed remarkable that Tom Williams would have had such sudden self-enlightenment of his own incompetence all those years in relying upon David Phillips as substitute crew chief. There was no explanation proffered as to why Respondent had tolerated such apparent incompetence for so long. There is no evidence that machine operators are either in short supply or readily available.

After the remains of the 4-inch pipe had been installed, the other employees, as had been routine past practice even with the Phillipses, were assigned to other jobs and kept working. Even such raw recruits as Fischer and Patton were assigned to other jobs and kept working.

The Phillipses testified that they observed a supply of 3-inch pipe on hand and testified, without contradiction, to past experience of being assigned 3-inch pipe installation when 4-inch pipe was not available. David Phillips' technical explanation of how it could have been done was not effectively contradicted. In cross-examination, David Phillips admitted he did not have access to the Salem job. However, Respondent did not proffer those same blueprints to corroborate its own witnesses. Allan Williams' testimony that only 4-inch pipe was able to be installed at that point contradicts Respondent testimony as to the flexibility of moving crews around, hither and yon, to avoid and later return to rocky areas, or areas of easement availability. There is no denial that the entire project did call for 3-inch pipe. Tom Williams admitted that there was no target date to install one type of pipe over another. He testified that the 4-inch pipe was only a ''small portion of the job.'' Respondent's witness Dillard testified that at Salem, up to that point ''mostly'' 4-inch pipe had been laid. No records were adduced that probably could have revealed precisely what type of work was involved, when and where.

Allan Williams testified, when asked in direct examination whether 3-inch and 4-inch pipe could be laid ''at the same time?'' ''You could if you have enough.''

Tom Williams testified in cross-examination that there was no target date for 4-inch pipe, that whether 4-inch, 3-inch, or 2-inch pipe, it made no difference. He was then asked if it made any difference whether he could have started laying 3-inch pipe. He answered: ''It makes no difference.'' Then he realized the import of that answer and he testified that once he ran out of 4-inch pipe, it was ''impossible'' to lay 3-inch pipe. His inconsistent, conclusionary testimony was not supported by any detailed explanation whatsoever, as it was not corroborated by any sort of documentation, despite the admitted existence of readily available engineering records and supply invoices.

After what appears to be a period of several weeks, work resumed at Salem. Allan Williams operated a trencher until he was injured, and a new employee was hired to replace him. Other employees were transferred to the Salem jobsite.

Tom and Allan Williams testified that the layoff was decided to be permanent because of their assessment of the Phillipses to be their worst employees. Indeed, so entranced by this defense were they that they fell into gross embellishment and obvious exaggeration the longer they testified. Low productivity, abuse of machinery, negligent cutting of underground telephone cables not only were manifested by the Phillipses from their immediate commencement of work at Salem, but during their entire 7 to 15 years of employment. The Williamses' testimony in this regard was so deeply flawed and unconvincing that it totally eroded their veracity. Not only was such testimony vague and conclusionary, but where it was attempted to be documented, the documentation backfired. For example, Tom Williams attempted to support his testimony that David Phillips broke a chain. When questioned by the General Counsel as to the circumstance for the proffered bill, Williams admitted that a new chain was unnecessarily purchased because the alleged ruined chain had, in fact, been repaired and returned to the machine. David Phillips' testimony as to the normal wear and tear on machinery was far more coherent and convincing.

I do not intend to spend too much discussion on the bogus issues of machinery abuse, cutting telephone cables, etc. It is sufficient to observe that even if such history of poor performance existed, it was previously condoned by years of toleration and, more particularly, disregarded when Tom Williams refused to accept the Phillipses' proffered resignation on June 13. However, I find that the Phillips did not have a history of being Respondent's worst workers. Respondent witness Dillard duly followed leading direct examination as to such conduct as well as alleged low productivity at Salem by the Phillipses. In cross-examination when he was required to think about his responses, he admitted that the Phillipses engaged in no conduct that was not routinely acceptable for any worker on the job.

Respondent's generalized, undocumented, unfounded, conclusionary testimony as to the Phillipses' low productivity is belied by the fact that on June 13, Tom Williams refused to accept their termination. As shown above, the credible evidence establishes that contrary to the testimony of the Williamses, the Salem jobsite was beset with problems that impeded productivity beyond the control of the Phillipses. Those problems were also compounded by the Phillipses' concerted demand for payment of the prevailing wage at the job rate and their threat to report Respondent to the IDOC.

Further indicia of the falsity of Respondent's low productivity defense is the fact that work proceeded so rapidly that Respondent ran out of pipe only a week after the concerted wage demand. Tom Williams testified that he himself as-

sesses progress by the speed with which the pipe supply dwindled. Yet, he testified that the Phillipses continued to work at only half speed despite his acquiescence to their wage demand and, yet, the 4-inch pipe veritably ''disappeared'' before his eyes in the following week. The answer to the work problem was clear. Respondent, until June 13, failed to follow its usual procedure of using two trenchers in a highly rocky terrain. For some reason on June 12, Tom Williams took out his frustration on the crew leaders, i.e., David Phillips and Dillard. He did not specifically accuse David and Kippy of malingering on June 11 as, indeed, he did not even cite it or any other work deficiency as worthy enough for discussion when they made their subsequent wage demand. It would have been perverse for Williams not to have brought up their incompetencies when he acquiesced to their wage demand. Moreover, ''new faces'' or at least one new face on the job did occur which reasonably resulted in higher productivity, i.e., a second trencher operator.

The real problem Respondent suffered by virtue of the Phillipses' employment was revealed in Kevin Phillips' testimony noted above, i.e., a concerted demand for higher pay which Respondent had not calculated into its costs. Thus, the Williamses took over the direct operations of the machines and rid themselves of the complainers.

Allen Williams' testimony recited the various reasons for the Phillipses' termination. One of the more absurd citations was the Phillipses' alleged abandonment of their work on June 12 and their nontransportation of the fuel truck to the jobsite. Not only was that conduct condoned by Tom Williams, but was with his explicit approval, if not direction, as the Phillips more credibly testify that they did not return to the site that day. After Allan Williams recited these disingenuous, palpably false reasons for the Phillips' discharge during his testimony as an adverse witness, he was asked whether there were any other reasons. Off guard for a moment, he unwittingly touched upon what I find is the only truthful element in his explanation, i.e., they were ''complainers.'' He later explained that they had a history of complaining. He cited as example that they had complained about vehicles they were forced to drive as a condition of their employment. He testified that he had in the past ordered them to ''knock it off,'' i.e., stop complaining. They did not. Tom Williams testified: ''They were never satisfied.''

Conclusions

Allan Williams' testimony virtually admits that the Phillipses were laid off, at least in part, because they concertedly complained about working conditions. The clear inference of this admission is that they disobeyed his orders and complained once too much, this time about their wages. Thus the General Counsel, by this adverse witness alone, has sustained the burden of proof required by *Wright Line*, 251 NLRB 1083 (1980). However, it is not even necessary to resort to a *Wright Line* analysis. The General Counsel has proven that Respondent's proffered explanation for the layoff and nonrecall of the Phillipses is so grossly false that even in the absence of direct evidence of knowledge of an animus to their concerted, protected activities, the trier of fact is constrained to infer an unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). In this case, the General Counsel has established that Respondent was aware of the concerted, protected activity, including a threat to report it to the IDOC and that the Respondent was adverse to a payment of higher wages, i.e., the object of their concerted activity. The General Counsel has established that Respondent was adverse to the discriminatees as ''complainers'' who ''were never satisfied.'' The General Counsel has established that subsequent to the discriminatees' threat to resort to the IDOC, and necessarily the DOL after their layoff, Respondent's interests were adversely affected by actions of those agencies. I find that the General Counsel has adduced abundant evidence that compels the conclusion that the Phillipses were permanently laid off because of their concerted, protected activities and that their nonrecall was cemented by the consequences of those activities.

The Phillipses' concerted activities on behalf of higher wages for themselves were clearly protected by the Act. See *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d. 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Accordingly, I find that Respondent's layoff of and decision to discharge David Phillips and Kippy Phillips on June 21, 1991, constituted violations of Section 8(a)(1) of the Act as alleged, constituting unfair labor practices interfering with commerce as set forth in the Act.

Although direct evidence of motivation, I do not find that the testimony of Kevin Phillips contains a sufficiently clear statement by Respondent to an employee that the Phillipses were discharged because of their concerted, protected activities to support the other allegation in the complaint of an 8(a)(1) violation.

Conclusions of Law

1. Respondent, Williams Contracting, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act on June 21, 1991, by terminating the employment of Kippy Phillips and David Phillips because of their concerted activities protected by the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be ordered to offer Kippy Phillips and David Phillips reinstatement and to make them whole for any loss of wages they may have suffered due to their unlawful discharges. The backpay due shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that Respondent be ordered to remove from its files any reference to their unlawful discharges on June 21, 1991, and to notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Williams Contracting, Inc., Orleans, Indiana, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against its employees because of their concerted activities protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Kippy Phillips and David Phillips immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to their unlawful discharges of June 21, 1991, and notify Kippy Phillips and David Phillips in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Orleans, Indiana place of business copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against our employees because of their concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL offer Kippy Phillips and David Phillips immediate unconditional and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net earnings, plus interest.

WE WILL remove from our files any reference to their unlawful discharges of June 21, 1991, and notify Kippy Phillips and David Phillips in writing that this has been done and that the discharges will not be used against them in any way.

WILLIAMS CONTRACTING, INC.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''